

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

Donald Ray Clifford,

Debtor.

Case No.: 04-33909

Chapter 13 Case

**NOTICE OF HEARING AND MOTION OBJECTING TO CONFIRMATION OF
CHAPTER 13 PLAN**

TO: All parties in interest pursuant to Local Rule 9013-3.

1. Michael J. Farrell, Chapter 13 Trustee (the "Trustee"), by and through his undersigned attorney, moves the court for the relief requested below and gives notice of hearing.

2. The court will hold a hearing on this motion at 10:00 a.m. on September 9, 2004, in Courtroom 228A, United States Courthouse, 316 North Robert Street, St. Paul, Minnesota, 55101.

3. Any response to this motion must be filed and delivered not later than 10:00 a.m., September 8, 2004, which is 24 hours before the time set for the hearing, or filed and served by mail not later than September 7, 2004, which is three days before the time set for the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this chapter 13 case was filed on July 6, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. § 1322 and 1325 and Bankruptcy Rule 3015. This motion is filed under Bankruptcy Rule 9014 and Local Rules 3015-2, 9006-1, 9013-1 through 9013-5, and such other Local Rules as may pertain. Movant requests relief with respect to denial of confirmation of the Debtor's Chapter 13 plan dated July 5, 2004 and filed July 6, 2004 (the "Plan").

6. Among the assets, which the Debtor listed, are: a one-half interest in checking and savings accounts with Farmers & Merchants State Bank valued at \$1,500.00, a 1969 Chevrolet camper motor home valued at \$2,000.00, a one-half interest in 1992 Dodge Caravan valued at \$1,025.00, a one-half interest in a 1997 Ford Ranger valued at \$3,525.00, and a pension valued at \$150,000.00, with a total value of \$158,050.00. The Trustee has requested information from the debtor regarding the pension, to no avail. Based on testimony at the §341 Meeting of

Creditors, the Trustee believes the pension to be an ELCA pension and therefore it is property of the estate, and not excluded from the estate under 11 U.S.C. §541(c)(2) as the debtor asserts. See In re Linda D. Roesler, BKY 03-60504, decision of Dennis D. O'Brien, (August 26, 2003). Also, the debtor may exempt only one vehicle under 11 U.S.C. §522(d)(2). The debtor has claimed an exemption under this statute for two vehicles. He is limited to one vehicle. Accordingly, the pension referenced herein is not excluded from the estate and is not exempt. If the pension is included in the property for purposes of calculating the amount allowed under (d)(5), the debtor exceeds the amount that may be claimed exempt under (d)(5).

7. The Debtor's Plan proposes payments of \$315.00 per month to the Trustee for 36 months, for a total of \$11,340.00 (the "Plan Funds"). After payment of the Debtor's attorney fees, the balance of the Plan Funds, net of the Trustee's statutory fee, are allocated for the Debtor's nonpriority unsecured creditors, whose claims are estimated at \$38,056.00, for a dividend of approximately 23%.

8. The Trustee objects to the Plan on the grounds that the value, as of the effective date of the Plan, of property to be distributed to allowed unsecured claims is less than the amount that would be paid on such claims if the Debtor's estate were liquidated under Chapter 7, contrary to 11 U.S.C. § 1325(a)(4).

9. If necessary, the Debtor or the Trustee may be called to testify in connection with this motion.

WHEREFORE, the Trustee moves the court for an order denying confirmation of the Debtor's proposed Chapter 13 plan dated July 5, 2004, filed July 6, 2004, and such other relief as may be just and equitable.

Ulvin and Sullivan Attorneys, PA

Dated: August 27, 2004

By: /e/ Patti J. Sullivan
Patti J. Sullivan, ID # 170124
Counsel for Chapter 13 Trustee
P.O. Box 16406
St. Paul Minnesota
(651) 699-4825

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Donald R. Clifford

BKY CASE NO. 04-33909

Debtor(s)

VERIFICATION

The Trustee verifies under penalty of perjury that the information contained in the foregoing motion is true and correct to the best of the Trustee's knowledge, information and belief.

Dated 8-27-04

A handwritten signature, likely of the Trustee, is written over a horizontal line.

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MEMORANDUM OF FACTS AND LAW

FACTS

The Trustee respectfully refers the reader to the facts detailed in the accompanying verified Motion, which, for the sake of brevity, will not be repeated here.

LEGAL DISCUSSION

The Trustee's primary objection to confirmation is that the Debtor's proposed Chapter 13 plan does not meet the "best interests of creditors" test of 11 U.S.C. § 1325(a)(4). In order to meet this test, the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim, must be at least equal to the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7 on that date. *11 U.S.C. § 1325(a)(4)*. In this case, the Debtor has nonexempt property under federal bankruptcy law.

The value of the Debtor's nonexempt assets is at least \$158,050.00. The proposed payout to unsecured creditors (priority and nonpriority) is only \$8,956.00. The Trustee contends that any payout over the length of the Debtor's proposed plan that is less than the value of his non-exempt assets violates 11 U.S.C. § 1325(a)(4) and therefore confirmation must be denied.¹

The determination of whether a Chapter 13 plan has been proposed in "good faith" is based on the totality of the circumstances. *In re Molitor*, 76 F.3d 218, 220-221 (8th Cir. 1996) (citing *In re LeMaire*, 898 F.2d 1346, 1349 (8th Cir. 1990)). The Trustee contends that the amount the debtor is proposing to pay his unsecured creditors supports the conclusion that the

¹ A more detailed analysis of the "best interests of creditors" issue would involve a discussion of how to arrive at the net liquidation value of the Debtor's estate in a Chapter 7 case (i.e., after payment of the Chapter 7 Trustee's fees and compensation and any other administrative expenses in the Chapter 7 case), and comparing this figure to the discounted value of the Debtor's proposed stream of payments over the three years of their Plan. Unless the Debtor challenges the issue, it is the Trustee's contention that the "best interests of creditors" test is only met if the total payout by the Debtor to his unsecured creditors is equal to or greater than the value of his equity interest in his nonexempt assets.

Plan was filed in bad faith and confirmation must be denied.

CONCLUSION

Confirmation of the Plan should be denied for the reasons stated herein.

Dated: August 27, 2004

Respectfully submitted:

Ulvin and Sullivan Attorneys, PA

By: /e/ Patti J. Sullivan
Patti J. Sullivan, ID # 170124
Counsel for Chapter 13 Trustee
P.O. Box 16406
St. Paul Minnesota
(651) 699-4825

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UNSWORN DECLARATION FOR PROOF OF SERVICE

I, Joeline A. Kissinger, employed by attorneys for Michael Farrell, Chapter 13 Trustee, declare that on August 27, 2004, I served Notice of Hearing and Motion Objecting to Confirmation of Chapter 13 Plan, Memorandum of Facts and Law and proposed Order on the individuals listed below, in the manner described:

By first class U.S. mail, postage prepaid:

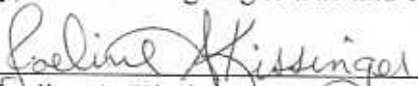
United States Trustee
1015 United States Courthouse
300 South 4th Street
Minneapolis, MN 55415

Curtis K. Walker
4356 Nicollet Avenue South
Minneapolis, MN 55409

Donald Ray Clifford
PO Box 27
Hanley Falls, MN 56245

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: August 27, 2004


Joeline A. Kissinger

UNITED STATES BANKRUPTCY COURT
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ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN

At St. Paul, MN, September 9, 2004.

The above-entitled matter came before the undersigned United States Bankruptcy Judge on the motion of Michael Farrell, Chapter 13 Trustee (the "Trustee") objecting to confirmation of the Debtor's Chapter 13 plan.

Appearances, if any, were noted in the minutes.

Upon the foregoing motion, arguments of counsel, and upon findings of fact and conclusions of law, if any, read into the record,

IT IS ORDERED:

1. Confirmation of the Debtor's Chapter 13 plan filed July 6, 2004 is DENIED.

Dennis D. O'Brien
United States Bankruptcy Judge